



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: GITHINJI, MAKHANDIA & SICHALE, JJ.A.)

CIVIL APPEAL NO. 12 OF 2013

BETWEEN

HASSAN JOHO.....1ST APPELLANT

HAZEL EZABEL NYAMOKI OGUNDE.....2ND APPELLANT

AND

1. SULEIMAN SAID SHAHBAL.....1ST RESPONDENT

2. INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....2ND RESPONDENT

3. MWADIME MWASHIGADI.....3RD RESPONDENT

(Being an Appeal from part of the finding in the Ruling of the High Court of Kenya at Mombasa (Ochieng J.) dated 23rd May, 2013

in

{PETITION NO. 8 OF 2013}

ORDER OF THE COURT

This appeal is against that part of the Ruling and decision of the High Court (*Ochieng J*) which decided that although **Section 76** of the **Elections Act** is unconstitutional the 1st respondent's is petition filed in the High Court will not be struck out but would nevertheless proceed to hearing.

The hearing of the petition started today.

Both *Mr. Ahmednassir* Senior Counsel and *Mr. Buti* learned counsel for the appellant addressed the Court fully this morning. Their contention in essence is that the learned trial Judge having found that

Section 76 of the **Elections Act** was inconsistent with **Article 87 (2)** of the Constitution regarding whether the petition should be filed within 28 days of the declaration of results by the Independent Electoral and Boundaries Commission or within 28 days of the publication of the results in the Kenya Gazette, the trial Judge should have struck out the petition. They also contend that the continuation of the election proceedings after that finding of unconstitutionality is a nullity.

Mr. Khagram learned counsel for the 2nd and 3rd Respondents also fully addressed the Court this morning with the permissions of the respective counsel for the parties. When the hearing of the appeal resumed this afternoon. *Mr. Gikandi* learned counsel for the 1st respondent submitted that the million dollar question in this appeal is whether **Section 76** of the **Elections Act** is inconsistent with **Article 87 (2)** of the Constitution. He then started referring to the decision of *Majaja J* in High Court at **Machakos Election petition No. 7 of 2013 Caroline Mwelu Mwandiku Versus Patrick Mweu Musimba & Another**, particularly paragraph 19 where the learned Judge held that there was no inconsistency between **Section 76** of the **Elections Act** and **Article 87(2)** of the Constitution.

All the other counsel, *Mr. Ahmednassir*, *Mr. Buti*, and *Mr. Khagram* objected to the issue of constitutionality of **Section 76** of the **Election Act** being raised. It was contended that the 1st respondent has not filed a cross-appeal against the finding of the High Court that **Section 76** was unconstitutional. *Mr. Gikandi* insisted that the issue of the constitutionality of the **Section 76** should be dealt with in this appeal under section 3 of the Appellate Jurisdiction Act.

Alternatively, he applied that he be given an opportunity to file a notice of cross appeal as the time for filing the Cross-appeal has not expired. He submitted that the constitutionality or otherwise of **Section 76** of the **Elections Act** is a matter of great public importance which has great national ramifications as it will affect many other election petitions which were filed on the basis that **Section 76** is constitutional.

We have considered the rival submissions.

We respectfully agree with the submissions of *Mr. Ahmednassir*, *Mr. Buti* and *Mr. Khagram* that it would be highly irregular and prejudicial to the appellant and 2nd and 3rd respondents if *Mr. Gikandi* was allowed to deal with the question of the constitutionality of **Section 76** in this appeal, which is brought on the basis that the finding of unconstitutionality of section 76 by the High Court was correct, without having filed a cross appeal.

However, we appreciate that the Election petition Rules provides that once an Appeal is filed in this court the Court of Appeal Rules should govern the conduct of the Appeal.

We also appreciate that Rule 93 (2) of the Court of Appeal Rule provide that a Notice of cross-appeal shall be filed not more than 30 days after service on the Respondent of the Memorandum of Appeal and Record of Appeal. This appeal was filed on 27th May 2013. If it was served on the same date, then the stipulated 30 days within which to file a cross appeal have not expired.

It is our view that given the great public importance of the decision of the High Court and the far reaching ramifications it may have on the pending election petitions all over the country, it is in the interest of justice that we should give opportunity to the 1st respondent to argue the issue of constitutionality of section 76 of the Election Act in this Appeal. That necessitates the adjournment of the Appeal.

That course will not unduly prejudice the appellant and the 2nd and 3rd respondents because an appeal and a cross-appeal are separate proceedings and in case of the cross-appeal being filed, the appellant and the 2nd and 3rd respondents will have full opportunity to be heard on the cross-appeal.

In view of the fact that by giving the 1st respondent an opportunity to file a cross-appeal will delay the determination of Appeal it is in the interest of justice and to avoid injustice to the appellant, that the Election Petition proceedings going on in the High Court should be stayed, and, we so order, until the

next hearing of this appeal and the intended cross-appeal.

It also in the interest of justice that this appeal and the cross-appeal should be heard as soon as practicable. We intend to fix it for hearing within a week if that is convenient to the respective advocates.

The cross-appeal to be filed and served within 3 days from the date hereof. Costs of adjournment to be costs in the appeal.

Dated at Malindi this 10th day of June 2013.

E. M. GITHINJI

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR